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Use and application of United Nations standards and norms in crime prevention and criminal justice

Statement submitted by the International Association of Penal Law (IAPL-AIDP) and by the International Institute of Higher Studies in Criminal Sciences (ISISC)**

The Secretary-General has received the following statement, which is being circulated in accordance with paragraphs 36 and 37 of Economic and Social Council resolution 1996/31.

* E/CN.15/2015/1.
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Establishment of a Working Group for the elaboration of updated model instruments on International Cooperation in Criminal Matters (11 May 2015)

The International Association of Penal Law (IAPL-AIDP, www.penal.org) is the world's oldest association of specialists in penal law and one of the oldest scientific associations. It was founded in 1924, and since then it has promoted the development of legislation and institutions with a view towards improving a more humane and efficient administration of justice. The main fields of activity of the AIDP include: (a) Criminal policy and the codification of penal law, (b) Comparative criminal law, (c) Human rights in the administration of criminal justice, (d) International criminal law (and, in particular, international criminal justice). The AIDP includes national groups in 38 countries worldwide and a high number of individual members. The Association's scientific work is mainly realized through the organization of the quinquennial congresses preceded by four international preparatory colloquiums, world and regional conferences, regular publication of the International Review of Penal Law and other scientific publications, by national and international research projects, legal opinions and expert reports on all areas of criminal justice. The AIDP has consultative status with the United Nations, UNESCO, the Council of Europe and the European Union and cooperates with other national, international and nongovernmental organizations. The official languages of the Association are English, French and Spanish.

Since its foundation, the AIDP has continuously dealt with the topic of international cooperation and mutual legal assistance and has even institutionalized it as the permanent fourth topic of its congresses and a regular topic of one of the preparatory colloquiums. For example, at the last congress in 2014 the focus was on MLA in the information society, in 1999 on MLA in the fight against organized crime, in 1984 on Structures and methods of international and regional cooperation in penal matters, in 1969 on Actual problems of extradition.

The International Institute of Higher Studies in Criminal Sciences (ISISC), established on September 1972 by the AIDP enjoys consultative status with the United Nations and the Council of Europe. ISISC since 1992, has a special cooperation agreement with the United Nations Office in Vienna and became one of the eighteen organizations comprising the United Nations Crime Prevention and Criminal Justice Programme Network (PNI Network). The Network supports the United Nations Office on Drugs and Crime (UNODC) in strengthening international cooperation in criminal matters.

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- Between 2002 and 2005, in cooperation with the United Nations, the AIDP and ISISC conducted five workshops addressing extradition and mutual legal assistance with the participation of 111 experts:
- In cooperation with the United Nations Centre for International Crime Prevention (UNCICP) and within the framework of creating legislative standards in the field of international criminal law, a workshop on the "Updating of the Manual on the Model Treaty on Extradition and the Manual

on the Model Treaty on Mutual Legal Assistance in Criminal Matters" took place on December 6-8, 2002;

- In cooperation with the United Nations Office on Drugs and Crime (UNODC), on December 2003 the training workshop "Extradition in Terrorism Cases" was held in order to train Ministry Officers from developing countries;
- To draft the United Nations model legislation on extradition, on December 2003 the workshop on "Elaboration of a Model Legislation on Extradition" was organized in cooperation with the UNODC;
- In 2004, as a follow-up to the 2003 activities, ISISC organized, in cooperation with the Terrorism Prevention Branch of UNODC, an expert group meeting on "The Development of New Tools on Mutual Legal Assistance and Extradition";
- In 2005, ISISC was involved in a related meeting with the UNODC Division of Treaty Affairs on "The Development of Tools on Mutual Legal Assistance and Extradition", addressing a revision of the model law related to the subjects of: mutual legal assistance in criminal matters; extradition; and new techniques to improve each modality's utility as a tool of international criminal procedure.

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Convinced that due to its longstanding expertise, scientific publications and research in this subject matter, AIDP/ ISISC are in the best position to contribute to the endeavour to improve mechanisms of international cooperation,

Recalling the United Nations Resolutions of 16 July 2014 (E/Res/2014/17) and of 18 December 2014 (A/Res/69/193) on International cooperation in criminal matters that are recommending that the ECOSOC Commission on Crime Prevention and Criminal Justice initiate a review of existing model treaties on international cooperation in criminal matters,

Recalling the Doha declaration adopted at the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice (A/Conf.222/L.6) inviting the ECOSOC Commission on Crime Prevention and Criminal Justice to continue its initiative to identify United Nations model treaties that may need to be updated, based on input received from Member States,

AIDP/ISISC are announcing the initiation of a Working Group to evaluate the existing model agreements and to make proposals for the improvement of the United Nations model treaties on international cooperation in criminal matters.

The objective of the AIDP/ISISC Working Group is to provide the United Nations with concrete proposals for an updated Model Treaty and Law on International cooperation in criminal matters. The need to update such instruments emerges in particular considering that:

- The United Nations Model Treaty on MLA and the United Nations Model Law on MLA are not aligned. Often provisions included on the same issues differ substantially, sometimes even to the point of being incompatible or contradictory. Both instruments should therefore as much as possible be

mirrored after one another and be upgraded in order to be more robust, complete and state-of-the-art;

Traditional instruments on international cooperation in criminal matters are made "by States for States", aiming at increasing efficiency and effectiveness of cooperation. The new instruments should therefore go beyond the classic approach of bilateral relations between States and take advantage of direct cooperation between judicial authorities and of new investigative tools as enforcement networks and joint investigation teams.

- The need for new investigative tools, as special investigation techniques and digital investigation techniques should be addressed in a systematic and actual way.

- Instruments on international cooperation in criminal matters should take more into account the position of the defendant, both as regards the possibility to trigger mutual legal assistance and the possibility to participate in the execution of an investigative measure (active participation).

- The respect of fundamental rights of the defence is not sufficiently safeguarded during international cooperation. Human rights minimum standards do not solve the problems posed by the fact that the defendant has to deal with various different legal systems. In transnational criminal proceedings different authorities become separately responsible for the investigation conducted in their own territory; however no authority (neither the requesting, nor the requested) controls the investigation as a whole. In order to ensure that the adjudicating state is held liable for the actions of officials of the requested state, the new United Nations Model Treaty and Law should increase the possibilities of the requesting State to have an influence on the modalities of execution of the request (*forum regit actum*).

In light of these considerations, the Working Group will start reflecting on concrete provisions to be included in the future instruments. Already at this point, however, some preliminary proposals can be formulated, both as regards the United Nations Model Treaty and the United Nations Model Law.

Recommendations concerning only the United Nations Model Treaty

The United Nations Model Treaty should be upgraded to the level of the United Nations Model Law, at least by:

- deletion or softening certain refusal grounds;

- introduction of comprehensive and state-of-the-art regulation regarding requests for freezing or seizure and confiscation;

- regulation of judicial assistance in relation to digital networks and communications systems;

- limitation of *forum regit actum* rule only when incompatible with the "fundamental principles of the law" of the requested State (instead of with its "law and practice");

- allowing for the sending and answering requests through the most expedient means, leaving a written trace and even orally in urgent cases, provided oral requests are confirmed by means leaving a written trace;

- allowing for the possibility of spontaneous information exchange.

Recommendations concerning both model instruments

Both the Model Treaty and Model Law should be expanded or complemented, in that they would equally: introduce the possibility of truly direct and horizontal communication and cooperation between locally competent judicial authorities, while providing central support services for them (translation, expert knowledge);

- allow, in parallel to traditional inter-state sending and service of documents through the central authorities, for a direct alternative, using the post or digital means of communications, while duly respecting the rights of the persons involved;

- incorporate sufficiently precise and elaborate provisions as regards the possibility, especially but non-exclusively in the taking of testimony, to use digital technology, such as video and telephone conferencing;

- reflect a more generic introduction of a "best of both worlds" principle in cross-border MLA cases as regards procedural guarantees, according to which States pursuing investigations would afford all persons involved, the protection that would accrue to them in a similar domestic case or in their own jurisdiction, while also affording them the protection that ensured to them under the national legal system of the State where the investigative measures are taken or where the persons concerned are situated when the investigative measures are taken;

- incorporate certain rights-enhancing refusal grounds, such as a facts-based *ne bis in idem* exception and an exception in cases where the alleged offender cannot be held criminally liable under the domestic law of the requested State;

- introduce a possibility to set refusal grounds aside upon the explicit and properly informed request by the defence, following consultation with his/her lawyer;

- recognize the standing of the defence to ask the competent national authority to issue a letter rogatory in order to gather exculpatory evidence;

- recognize the possibility for the defence to actively participate in the execution of the requests. For example, Art. 15 of the United Nations Model Law with regard to the taking of testimony or statements provides that "any person to whom the foreign investigation, prosecution or proceeding relates or that person's legal representative" is allowed to participate and to "question the witness". The updated instrument should consider extending the provision of Art. 15 to other forms of assistance;

- introduce the possibility of transfer of a person in custody from the requesting to the requested State;

- introduce a sufficiently elaborate framework for the use of cross-border special investigative techniques, such as e.g. controlled deliveries, covert

investigations, cross-border observation, hot pursuit, or joint investigation teams;

- introduce and regulate the interception of private ICT communications and the monitoring of bank accounts, as well as the possibility to use such techniques in real time;

- introduce an obligation to grant MLA also for investigations into corporate crime, even if the requested State does not allow for corporate liability for the offences concerned;

- spell out that the later use of information gathered by intelligence services in criminal matters is only allowed where the information concerned could have been obtained through regular mechanisms for judicial or law enforcement cooperation in criminal matters.